91-1685

Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

ESTELLA TIMMS, Petitioner,

v.

ANTHONY FRANK, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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April 17, 1992

QUESTION PRESENTED

Whether a district court must notify a pro se civil litigant of the consequences of failing to respond to a motion for summary judgment with affidavits or other documentary evidence before granting summary judgment.

LIST OF PARTIES

The parties to the proceedings in the United States District Court for the Northern District of Illinois and the Court of Appeals for the Seventh Circuit were the Petitioner, Estella Timms, and the Respondents, Anthony Frank and Burdette Person. The Seventh Circuit Court of Appeals found the Respondent, Burdette Person, to not be a proper party under both Title VII, 42 U.S.C. sec. 2000e-16, and the Age Discrimination in Employment Act(ADEA), 29 U.S.C. sec. 633a. Since the issue of whether the Respondent, Burdette Person, was a proper party is not addressed in this petition, the Respondent, Burdette Person, is not named as a party herein.

The respondent before this Court is Anthony Frank.

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The Petitioner, Estella Timms, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on January 6, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 953 F.2d 281(7th Cir. 1992), and is reprinted in the appendix hereto, p. 1a, infra. The order denying the Petitioner's petition for rehearing has not been reported. It is reprinted in the appendix hereto, p. 13a, infra.

The memorandum opinion and order of the United States District Court for the Northern District of Illinois (Zagel, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 14a, infra.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. sec. 2000e-16 and 29 U.S.C. sec. 633a, the Petitioner brought this suit in the

United States District Court for the Northern District of Illinois. On January 16, 1991, the district court granted the Respondent's motion for summary judgment. See p. 9a, infra.

On Petitioner's appeal, the Court of Appeals for the Seventh Circuit on January 6, 1992, entered a judgment affirming the district court's order granting the Respondent's motion for summary judgment. See p. 1a, infra. The Petitioner filed a petition for rehearing on January 21, 1992 which was denied on January 28, 1992. See p. 8a, infra.

The jurisdiction of this Court to review the judgment of the Court of Appeals for the Seventh Circuit is invoked under 28 U.S.C. sec. 1254(1).

STATEMENT OF THE CASE

The Petitioner proceeding pro se, initiated this suit by filing a complaint on January 30, 1990 in the United States District Court for the Northern District of Illinois. The Petitioner's complaint alleged that in violation of Title VII, 42 U.S.C. sec. 2000e-16 and the Age Discrimination in Employment Act(ADEA), 29 U.S.C. sec. 633a the Respondent failed to rehire the Petitioner due to her race and age.

Commencing in 1984 until 1987, the Petitioner made three separate applications for reinstatement with the United States Postal Service. Each of the Petitioner's applications for reinstatement was denied by the United State Postal Service. The Petitioner after the denial of her third application for reinstatement pursued administrative remedies.

After pursuing administrative remedies, the Petitioner filed suit on January 30, 1990. Prior to the filing of the Petitioner's complaint, the Petitioner filed a motion for the appointment of counsel on January 24, 1990, which was subsequently denied. The Respondent on September 13, 1990 filed a motion for summary judgment supported by three affidavits. Upon receipt of the Respondent's motion for summary judgment, the Petitioner filed a second motion for the appointment of counsel which was denied on January 6, 1991. On October 24, 1990, the Petitioner filed a handwritten answer to the Respondent's motion for summary judgment unsupported by affidavits or other documentary evidence. At no time prior to the Petitioner filing

her answer to the motion for summary judgment was the Petitioner given notice of the consequences of failing to respond to a motion for summary judgment with affidavits or other documentary evidence by either counsel for the Respondent or by the district court.

The district court in a memorandum opinion and order entered on January 16, 1991 granted the Respondent's motion for summary judgment. The district court in granting summary judgment noted repeatedly the failure of the Petitioner to submit to the court any documentary evidence or affidavits in support of her case or to counter the affidavits submitted by the Respondent.

The Petitioner on February 27, 1991 appealed the district court's order granting of summary judgment to the Seventh Circuit Court of Appeals. The Petitioner was able to secure counsel for the appeal, who argued that the district court's entry of summary judgment was in error, for the Petitioner proceeding pro se never received notice of the consequences of failing to respond to a motion for summary judgment with affidavits or other documentary evidence. The Seventh Circuit Court of Appeals held that the Petitioner was entitled to notice of the consequences of failing to respond to a motion for summary judgment with affidavits or other documentary evidence. In affirming the district court's order, the Seventh Circuit Court of Appeals held that there would be no point in remanding, since based upon the evidence the Petitioner could not have avoided summary judgment had the Petitioner received adequate notice.

REASON FOR GRANTING THE WRIT

I. THE UNITED STATES COURTS OF APPEALS ARE DIVIDED ON THE QUESTION

In June of 1934, President Roosevelt signed into law an act conferring upon this Court the power to make rules of procedure for federal civil suits. A central purpose shaping this Court's enactment of the Federal Rules of Civil Procedure was to bring about uniformity in the federal courts. See ***Hanna v. Plumer***, 380 U.S. 460(1964).

The question presented by this case is a question of federal civil procedure involving the provisions of Rule 56 of the Federal Rules of Civil Procedure. The United States Courts of Appeals

which have considered the question have rendered conflicting decisions.

The United States Courts of Appeals for the Second, Fourth, Fifth, Tenth, Eleventh and the District of Columbia Circuits have held that a district court may not grant summary judgment when a pro se civil litigant has not been given notice by either the district court or the counsel for the movant of the consequences of failing to respond to a motion for summary judgment with affidavits or other documentary evidence. See ***Sellers v. M.C. Floor Crafters, Inc.***, 842 F.2d 639 (2d Cir. 1988), ***Rosebcro v. Garrison***, 528 F.2d 309 (4th Cir. 1975), ***Baker v. Norman***, 651 F.2d 1107 (5th Cir. 1981), ***Jaxon v. Circle K Corp.***, 773 F.2d 1138 (10th Cir. 1985), ***U.S. v. One Colt Python .357 Cal. Revolver***, 845 F.2d 287 (11th Cir. 1988), and ***Ham v. Smith***, 653 F.2d 628 (D.C. Cir. 1981).

The United States Courts of Appeals for the Sixth and Ninth Circuits have held that a district court may grant summary judgment when a nonprisoner pro se civil litigant has not been given notice by either the district court or the counsel for the movant of the consequences of failing to respond to a motion for summary judgment with affidavits or other documentary evidence. See ***Brock v. Hendershott***, 840 F.2d 339 (6th Cir. 1988) and ***Jacobsen v. Filler***, 790 F.2d 1362 (9th Cir. 1986).

The United States Court of Appeals for the Seventh Circuit in this case adopted the rule that a district court may grant summary judgment when a pro se civil litigant has not been given notice when it appears that the pro se civil litigant could not have avoided summary judgment.

II. THE QUESTION PRESENTED IS AN IMPORTANT QUESTION OF THE APPLICATION OF FEDERAL CIVIL PROCEDURE WHICH SHOULD BE RESOLVED BY THIS COURT

A. THE NEED FOR UNIFORMITY IN THE APPLICATION OF THE FEDERAL RULES OF CIVIL PROCEDURE

The conflict in decisions among the Circuit Courts of Appeals leaves unsettled the question of whether a district court can grant

summary judgment when a pro se civil litigant has not been given notice by either the district court or the counsel for the movant of the consequences of failing to respond to a motion for summary judgment with affidavits or other documentary evidence. This question is an important one which should be resolved by this Court due to the need to apply the Federal Rules of Civil Procedure uniformly in all Circuits. The conflict in decisions among the Circuit Courts of Appeals allows for disparate treatment among pro se civil litigants predicated solely upon which Circuit their suit is brought.

B. PRO SE CIVIL LITIGANTS NEED TO RECEIVE NOTICE OF THE CONSEQUENCES OF FAILING TO RESPOND TO A SUMMARY JUDGMENT MOTION WITH AFFIDAVITS OR OTHER DOCUMENTARY EVIDENCE

This Court has repeatedly stated that pro se litigants as well as those represented by an attorney are entitled to meaningful access to the courts. See ***Bounds v. Smith,*** 430 U.S. 817 (1977) and ***California Transport v. Trucking Unlimited,*** 404 U.S. 508 (1971). The first amendment and the due process clause of the fourteenth amendment guarantee everyone meaningful access to the courts. Yet to the pro se civil litigant handicapped by a lack of legal training and knowledge, the complex and detailed requirements of Rule 56 of the Federal Rules of Civil Procedure may prevent the pro se civil litigant's meaningful access to the courts.

In the case at bar, the Court held that it would be unrealistic to attribute to a pro se civil litigant, the knowledge that the purpose of a motion for summary judgment is to head off a full scale trial by conducting a trial in miniature, on affidavits, so that not submitting counter affidavits is the equivalent of not presenting any evidence at trial. Consequently, in the case at bar and in many other similar cases involving pro se civil litigants, summary judgment is entered against these litigants before they are able to meaningfully present their case in court.

Summary judgment is not a catch penny contrivance to take unwary litigants into its foils and deprive them of a fair trial. ***Whitaker v. Coleman,*** 115 F.2d 305, 307 (5th Cir. 1940). The failure of the district court or the counsel for the movant to inform the pro se civil litigant of the need to respond to a summary

judgment motion with affidavits or other documentary evidence denies all parties to the suit a full hearing on the merits and negates the pro se civil litigant's constitutional right of access.

CONCLUSION

Three important reasons exist for this Court to resolve the question presented in this case. First, the United States Courts of Appeals are divided on the question, resulting in a lack of uniform application of the summary judgment provision of the Federal Rules of Civil Procedure. Second, the conflict in the United States Courts of Appeals allows for disparate treatment among pro se civil litigants predicated solely upon which Circuit their suit is brought. Last, the failure to give all pro se civil litigants notice of the requirements of Rule 56 of the Federal Rules of Civil Procedure will deny all parties to the suit a full hearing on the merits and negate the pro se civil litigant's constitutional right of access.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 91-1442

ESTELLA TIMMS,

Plaintiff-Appellant,

v.

ANTHONY M. FRANK,*

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90-C-408—James B. Zagel, *Judge*.

ARGUED NOVEMBER 12, 1991—DECIDED JANUARY 6, 1992

Before CUMMINGS, WOOD, JR., and CUDAHY, *Circuit Judges*.

CUMMINGS, *Circuit Judge*. Estella Timms, a former employee of the United States Postal Service, sued Anthony Frank, the Postmaster General, under Title VII, 42 U.S.C. § 2000e-16, and the Age Discrimination in Employment

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* Timms names Burdette Person, the official who refused to reinstate her, as a defendant in this case. Under both the ADEA and Title VII, however, the only proper defendant in a suit alleging discrimination by the Postal Service is the head of the agency—the Postmaster General. *Ellis v. United States Postal Service*, 784 F.2d 835, 838 (7th Cir. 1986). Therefore Person is not a proper defendant in this case.

Act (ADEA), 29 U.S.C. § 633a. Proceeding *pro se*, Timms alleged that the Postal Service had discriminated against her on the basis of her age and race.[1] The district court granted summary judgment to the defendant, finding that the Postal Service had given a legitimate, non-discriminatory reason for refusing to reinstate Timms and that Timms's claim that a younger white male co-worker with a similar work record received preferential treatment was unconvincing. We now consider the propriety of the grant of summary judgment.

I. *BACKGROUND*

Timms worked for the Postal Service during two different periods. First, she worked as a distribution clerk from 1966 until 1972, when she resigned for medical reasons. She was reinstated as a part-time distribution clerk in 1973. Timms continued to work until 1979, when, for health reasons,[2] she stopped reporting to work and was placed on leave without pay (LWOP) status. Over a year later Timms was still on LWOP status, and the Postal Service notified her that she could not remain on LWOP unless she gave some indication that she would be able to return to work within a reasonable time. As the medical statements Timms had already submitted did not indicate that she would return to work within a reasonable time, the Postal Service told her that she would be separated from her position unless she provided medical certification regarding her likely return to work. She failed to provide such information, and her employment was terminated on March 25, 1981.

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[1] Timms also alleged sex and handicap discrimination. The district court found these claims to be meritless and Timms has not pursued them on appeal.

[2] Timms apparently suffered from asthma, hypertension, and anxiety. She claims she had recovered, however, at the time she sought reinstatement.

Timms requested reinstatement in 1982, but was denied.[3] She requested reinstatement again in 1987, but was again denied, because of her previous work record. After pursuing administrative remedies, she filed this suit.

II. *ANALYSIS*

Timms challenges the grant of summary judgment on two grounds. First, she argues that summary judgment was improper because she was proceeding *pro se* and never received adequate notice as to the effect of a failure to support a response to a summary judgment motion with affidavits or other documents. Under *Lewis v. Faulkner*, 689 F.2d 100 (7th Cir. 1982), she argues, all *pro se* litigants are entitled to such notice. Second, Timms asserts that the defendant was not entitled to summary judgment because genuine issues of material fact remained. Specifically, she claims that issues remained as to whether she was qualified for the position and as to the intent of the defendant in refusing to reinstate her.

In considering these issues we review the record *de novo*, drawing all reasonable inferences in favor of the non-movant. *Rizzo v. Caterpillar, Inc.*, 914 F.2d 1003 (7th Cir. 1990). Summary judgment is proper only if there are no genuine issues of material fact remaining, such that the movant is entitled to judgment as a matter of law. *Id.*; Fed. R. Civ. P. 56(c).

A. *Notice to Pro Se Litigants*

Lewis v. Faulkner, 689 F.2d 100 (7th Cir. 1982), involved a prisoner, suing *pro se*, who failed to respond to the defendants' summary judgment motion. The court inferred

[3] The complaint states that Timms applied for reinstatement in 1984, but does not mention the 1982 application. There is a 1982 letter denying a reinstatement request, but nothing from 1984. It appears, then, that Timms requested reinstatement only in 1982 and 1987.

that the Federal Rules of Civil Procedure forbade a district court to act on a summary judgment motion without giving the non-movant a reasonable opportunity to present counter-affidavits. *Id.* at 100-01. Further, the court found that "[a] reasonable opportunity presupposes notice." *Id.* at 101-02. The court believed that the need to respond to such a motion with affidavits is not obvious to a layman, holding:

> Since few prisoners have a legal background, we think it appropriate to lay down a general rule that a prisoner who is a plaintiff in a civil case and is not represented by counsel is entitled to receive notice of the consequences of failing to respond with affidavits to a motion for summary judgment.

Id. at 102. The court went on to state that defense counsel could provide this notice by including a short and plain statement of the need to respond with their summary judgment motion, giving both the text of Rule 56(e) and an explanation of the rule in ordinary English. *Id.* However, if defense counsel failed to provide this notice, the court required the district judge to do so. *Id.* at 103.

Timms argues that the *Lewis* notice requirement applies to all *pro se* litigants, not just prisoners. Two cases directly support this argument. *Signer v. Indiana University Foundation*, 741 F. Supp. 165 (S.D. Ind. 1990), held that non-prisoner *pro se* litigants also have a right to the notice required by *Lewis*. The court found that a litigant's right to a "reasonable opportunity" to submit affidavits opposing a summary judgment motion should not depend on whether the litigant is a prisoner. In fact, the court observed, prisoners often have a more effective legal support system than non-prisoners, given their access to law libraries and jailhouse lawyers, not to mention the amount of time prisoners have to research their cases. *Id.* at 166; *see also Procup v. Strickland*, 792 F.2d 1069, 1071 (11th Cir. 1986) (also noting other advantages of prisoners, such as the greater likelihood of being allowed to proceed *in forma pauperis* and access to free materials, paper, and

postage). Similarly, the Second Circuit in *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639 (2d Cir. 1988), reversed a grant of summary judgment because the *pro se* plaintiff, a non-prisoner, had not been advised of the consequences of failing to respond to a summary judgment motion. Some courts have extended the rule to non-prisoner litigants on their own, as a matter of general practice. *See Hights v. International Harvester Co.*, 675 F. Supp. 418, 419 n.2 (N.D. Ill. 1987) ("in accordance with its uniform practice whenever Rule 56 motions are asserted against unrepresented litigants . . . this court mailed Hights [a *pro se* non-prisoner] notice as to the procedural requirements she had to observe in response") (citing *Lewis*).

In applying their own *Lewis*-type rules, other circuits have used language that would seem to apply to all *pro se* litigants, even though the specific case involved a prisoner. For example, in *United States v. One Colt Python .357 Cal. Revolver*, 845 F.2d 287 (11th Cir. 1988), the plaintiff was an involuntary resident at a Mental Hospital. In discussing his case, however, the court did not focus on the restrictions his confinement placed on his legal representation, but rather stated generally:

> We have repeatedly emphasized that care must be exercised to insure proper notice to a litigant not represented by counsel. Litigants without counsel lack formal legal training and "occupy a position significantly different from that occupied by litigants represented by counsel." A motion for summary judgment should only be granted against a litigant without counsel if the court gives clear notice of the need to file affidavits or other responsive materials and of the consequences of default.

Id. at 289 (citations omitted). In *Ham v. Smith*, 653 F.2d 628, 630 (D.C. Cir. 1981), the District of Columbia Circuit remanded a case because a *pro se* litigant recently released from prison had not been given proper notice as to how to respond to a summary judgment motion. Fol-

lowing *Hudson v. Hardy*, 412 F.2d 1091 (D.C. Cir. 1968), the court reasoned that a *pro se* plaintiff released in the middle of a case faced many of the same handicaps as a prisoner. *Ham*, 653 F.2d at 630. Yet the court did not specify what these handicaps were or how they differed from those faced by all *pro se* plaintiffs. More, the court began its discussion of the issue by stating, "This court has recognized that district judges should accord special attention to pro se litigants faced with summary judgment motions." *Id.* at 629-30. The Fourth Circuit has also used language indicating that non-prisoners, too, deserve notice of the requirements of Rule 56(e), though the specific case before it involved a prisoner. In *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975) (per curiam) the district court granted summary judgment for the defendant prison warden. Remanding, the court wrote:

> [I]f this were an ordinary civil action the failure of Roseboro to file any counter-affidavit would warrant the entry of summary judgment. We agree with the plaintiff, however, that there is another side to the coin which requires that the plaintiff be advised of his right to file counter-affidavits or other responsive material . . . Assuredly, a *pro se* plaintiff is entitled to such a reasonable safeguard.

Id. at 310.

This circuit, too, has spoken in terms of the rights of all *pro se* litigants, not just prisoners. *Lewis* itself, although limiting its holding to prisoner litigants,[4] spoke in terms of what would be reasonable to a layman, not merely to a prisoner. 689 F.2d at 102. A later opinion observed that *Lewis* solved "the problem of *pro se* litigants who trip over the provision of Fed. R. Civ. P. 56(e)," not mentioning whether that rule was still limited to pris-

[4] "We leave for another day the possible extension of our new rule to other classes of *pro se* litigants, including applicants for habeas corpus." 689 F.2d at 102.

oners. *Averhart v. Arrendondo*, 773 F.2d 919, 920 (7th Cir. 1985). *Averhart* involved a *pro se* prisoner whose Rule 59(e) motion had been denied, and who failed to realize that this denial required him to file another notice of appeal under Fed. R. App. P. 4(a)(1) in order to preserve his right to appeal. Yet, in suggesting a rule similar to *Lewis*, namely that district judges should give *pro se* litigants notice of their right to appeal from the denial of a Rule 59(e) motion, the court did not distinguish between *pro se* prisoners and others. *Id.*

Some circuits, however, have directly held that only *pro se* prisoners are entitled to notice of the requirements of Rule 56(e). *Brock v. Hendershott*, 840 F.2d 339, 343 (6th Cir. 1988); *Jacobsen v. Filler*, 790 F.2d 1362, 1364-65 (9th Cir. 1986). These cases focused on the freedom non-prisoners have to choose between either retaining counsel or representing themselves, stating that "[i]t is the element of 'choice' which most clearly distinguishes the *pro se* prisoner cases from the suit at bar," and "[a] litigant who chooses *himself* as legal representative should be treated no differently." *Jacobsen*, 790 F.2d at 1364 n.4 and 1365 (emphasis in original). The Ninth Circuit also feared that requiring notice to non-prisoners "implicates the court's impartiality and discriminates against opposing parties who do have counsel." *Id.* at 1365 n.7.

In spite of these arguments, we believe that all *pro se* litigants, not just prisoners, are entitled to notice of the consequences of failing to respond to a summary judgment motion. As outlined in *Lewis*, this notice should include both the text of Rule 56(e) and a short and plain statement in ordinary English that any factual assertion in the movant's affidavits will be taken as true by the district court unless the non-movant contradicts the movant with counter-affidavits or other documentary evidence. *See Lewis*, 689 F.2d at 102. Counsel should include this notice with the summary judgment motion, but if they fail to do so this responsibility will fall on the district court. *See id.* at 102-03. We base this decision on the rationale of

Lewis and a belief that the attempted distinction between prisoners and other *pro se* litigants with regard to this issue is unconvincing.

Lewis required notice of Rule 56(e)'s requirements because the need to answer a summary judgment motion with counter-affidavits is "contrary to lay intuition." 689 F.2d at 102.

> It would not be realistic to impute to a prison inmate (unless, like the 'former law professor' of whom this court spoke in *Maclin v. Freake*, 650 F.2d 885, 888 (7th Cir. 1981) (per curiam), the prisoner has legal training) an instinctual awareness that the purpose of a motion for summary judgment is to head off a full-scale trial by conducting a trial in miniature, on affidavits, so that not submitting counter affidavits is the equivalent of not presenting any evidence at trial.

Id. It would also be unrealistic to impute this knowledge to a non-prisoner without legal training. Further, the idea that non-prisoners do not deserve notice because they have chosen to proceed *pro se* ignores the fact that most litigants who sue without a lawyer do so because they cannot afford one. *Jacobsen*, 790 F.2d at 1367-68 (Reinhardt, J., dissenting). Indigent plaintiffs have no more "freedom of choice" as to legal representation than do prisoners. Also, even though non-prisoner plaintiffs may often be more educated than prisoners, that is no guarantee that a layman will understand the effects of a failure to respond to a summary judgment motion. *See Lewis*, 689 F.2d at 102; *see also* Note, *An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule*, 55 Fordham L. Rev. 1109, 1132-37 (1987).

In light of our holding that Timms had a right to be notified of the need to respond to the defendant's summary judgment motion, the next question is whether she received such notice. The defendant's Memorandum in Support of Motion for Summary Judgment included a sum-

mary of Rule 56 and a statement that, "To establish that a genuine dispute exists, plaintiff must show more than that there is "some evidence" controverting the Postal Service's proof—she must produce enough evidence to make a determination in her favor possible." Appellee Appendix at 4. At no point did the defendant explicitly notify Timms of the need to produce *more* evidence, beyond her pleadings, to oppose the motion. This was not sufficient notice. Timms could reasonably have believed, like the hypothetical lay person in *Lewis*, that she would have an opportunity to argue the evidence before the court at a hearing or at trial. *Lewis*, 689 F.2d at 102. The next question, then, is whether the lack of notice prejudiced Timms to the extent that the district court's grant of summary judgment was improper.

B. *Prejudice Due to Lack of Notice*

The defendant asserts that the lack of notice in this case is irrelevant, as Timms's actions reveal that she knew what she had to do to oppose this motion. Timms supplemented her Answer to Defendants' Motion for Summary Judgment with a copy of her entire EEO file (195 pages) and other documents. In her answer she referred to documents in the EEO file as rebutting the defendant's motion. Specifically, she cited both her own previous work record and the record of James Krackenberger, the white male whom she claims received preferential treatment. She also referred to documents showing that the Postal Service was hiring at the times when she was denied and Krackenberger was granted reinstatement, as well as documents regarding her past compliance with Postal Service regulations. The defendant contends that the nature of this response shows an understanding of Rule 56(e) and a lack of prejudice. Timms, however, asserts that the question of prejudice is irrelevant, as a *pro se* plaintiff who does not receive the notice required by *Lewis* is entitled to a remand and an opportunity to oppose the summary judgment motion in an informed manner, relying on

Kelley v. McGinnis, 899 F.2d 612 (7th Cir. 1990) (per curiam).

The question of prejudice is relevant, however, for if Timms could not have avoided summary judgment if she had received adequate notice, there would be no point in remanding. *See Ross v. Franzen*, 777 F.2d 1216, 1219 (7th Cir. 1985) ("It is not reversible error to fail to give such notice in the limited circumstances where it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' ") (quoting *Muhammed v. Rowe*, 638 F.2d 693, 695-96 (7th Cir. 1981); *accord Kelley*, 899 F.2d at 615. To make out a prima facie case under Title VII, the plaintiff must show that she is a member of a protected class who was qualified for reinstatement but was denied, while a similarly situated employee outside of her protected class, and with a similar work history, was reinstated. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 96 S. Ct. 2574; *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824. If the defendant rebuts a prima facie case by articulating a lawful, non-discriminatory reason for its decision, then the plaintiff must persuade the trier of fact that this reason is a mere pretext for discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-56, 101 S. Ct. 1089, 1094-95; *Visser v. Packer Engineering Assoc., Inc.*, 924 F.2d 655 (7th Cir. 1991) (en banc) (same standard applies for disparate treatment claims under Title VII and ADEA). To carry this burden, Timms would need to offer evidence showing that a discriminatory reason more likely than not motivated the Postal Service, or that the proffered explanation is incredible. *Burdine*, 450 U.S. at 256, 101 S. Ct. at 1095.

1. Prima Facie Case

Timms, a black female over the age of forty, is a member of a protected class. *See* 42 U.S.C. § 2000e-16; 29 U.S.C. § 633a. Timms compares herself to James Kracken-

berger, a white former co-worker. Krackenberger also left the Postal Service for health reasons, and, Timms alleges, had a worse work record than she did, yet he was reinstated. Timms believes that this shows discrimination, but there are important differences between the two.

Krackenberger was seeking reinstatement for the first time. Timms was seeking reinstatement for the second time, having been reinstated once before. Also, Krackenberger had voluntarily resigned, whereas, despite her claims to the contrary, there is no proof that Timms resigned from the Postal Service before she was terminated. Most importantly, Krackenberger's and Timms's applications were considered by different people. Krackenberger was reinstated by Frank Santoro; Timms was denied by Burdette Person. This is a significant point, as it is difficult to say that the difference was more likely than not the result of intentional discrimination when two different decision-makers are involved. *See Cooper v. North Olmstead*, 795 F.2d 1265, 1271 (6th Cir. 1986) (noting that although a change in managers is not a complete defense to a discrimination claim, it can suggest a basis for the difference in treatment); *Monahan v. Illinois Central Gulf Railroad Co.*, 31 F.E.P. Cases 1513 (N.D. Ill. 1983), *aff'd* 738 F.2d 442 (7th Cir. 1984). Reinstatement decisions are discretionary, and under such circumstances utter consistency is difficult. As to decisions by Person alone there is no way to infer that the denial of Timms's request was discriminatory, as Person never granted *any* reinstatement request.

At oral argument, Timms said that, given proper notice, she could have produced affidavits from former supervisors stating that she had been a good worker and did her job well. Such affidavits, however, would not erase the many differences between her and James Krackenberger. Under these facts, Timms was not prejudiced by the lack of notice under *Lewis*, as the additional evidence she could have presented would still be insufficient to make out a prima facie case. *Ross*, 777 F.2d at 1219. Thus, summary judgment was proper.

2. Pretext

Even if she could present a prima facie case, Timms has failed to show that, given notice, she could have exposed the Postal Service's reason for terminating her as a mere pretext for discrimination. Burdette Person stated in her affidavit that she based her decision on Timms's poor attendance record. Appellee Appendix at 18-19. Person's letter to Timms indicated that past performance and attendance are important factors in reinstatement decisions, a statement borne out by Postal Service regulations. Given that Timms had twice before left the Postal Service for health reasons and had been frequently absent, this reason appears to be non-discriminatory. In her original response to the summary judgment motion Timms relied on her comparison to James Krackenberger as proof of discriminatory intent. As already discussed, this comparison is unconvincing. Further affidavits praising Timms's work performance would also fail to show this reason was a mere pretext, as these would not change her record of absenteeism. The lack of notice, therefore, was not prejudicial.

III. *CONCLUSION*

We hold that *pro se* plaintiffs, even non-prisoners, are entitled to notice of the consequences of failing to respond to a summary judgment motion. However, in light of Timms's inability to show that the lack of notice prejudiced her, the district court's grant of summary judgment is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

January 28, 1992

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. HARLINGTON WOOD, JR., Senior Circuit Judge

ESTELLA TIMMS, Plaintiff-Appellant,	)	Appeal from the United States District Court for the Norther District of Illinois, Eastern Division.
No. 91-1442 vs.	)	
	)	No. 90-C-408
ANTHONY M. FRANK, Defendant-Appellee.	)	James B. Zagel, Judge.

ORDER

On consideration of the petition for rehearing filed by plaintiff-appellant on January 21, 1992, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ESTELLA TIMMS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO. 90 C 0408
	)	
ANTHONY M. FRANK and BURDETTE C. PERSON	)	HONORABLE JAMES B. ZAGEL
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Statement of Facts

1. Estella Timms is a resident of Illinois. Anthony M. Frank is the Postmaster General of the United States, and Burdette C. Person is a retired Postal employee who was formerly the Manager of Employment and Development at the North Suburban Facility, North Suburban, Illinois. This Court has jurisdiction over this matter pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000-16c and the Age Discrimination in Employment Act of 1967, 29 U.S.C. sec. 633a. All of the events herein occurred within this District.

2. Timms began work with the Postal Service on August 30, 1966 and resigned on May 8, 1972. She requested and was granted reinstatement in 1973. She returned to work on April 19, 1973. She went into a leave without pay status on November 5, 1979. On January 27, 1981, the Postal Service mailed plaintiff a letter advising her that she could not stay on LWOP status any longer unless there was cause to expect her to return to duty within a reasonable time. She was asked to submit medical certification within fourteen days advising the Postal Service of her ability to return to duty. She did not respond and was separated from the Postal Service effective March 25, 1981.

3. Timms also requested reinstatement on February 3, 1987, and, along with her request, submitted a medical statement from Dr. May that her prior health problems had abated. She was

informed by letter dated March 12, 1987 that her request was denied by Person in her best interest and that of the Postal Service, following a review of her personnel record.

4. It was Person's responsibility to review requests for reinstatement of former Postal Service employees. These decisions regarding reinstatement are made at the discretion of the appointing official, who was Mr. Person in this instance. After reviewing Timms' personnel records, Person determined that it would not be in her best interest or in the best interest of the Postal Service to reinstate her. An applicant for postal employment may be omitted from consideration because of previous unsatisfactory service. Indeed, Person had never reinstated any former postal employees.

5. James Krackenberger began working for the Postal Service in 1972 and resigned voluntarily on October 26, 1981. Krackenberger submitted a request for reinstatement on June 16, 1983, and was reinstated on September 3, 1983. Person had no role in this decision. Two other former employees over the age of forty were reinstated to the North Suburban facility between June 7, 1986 and March 25, 1988 and the following individuals were denied reinstatement at the North Suburban facility between January 5, 1987 and June 30, 1987:

Comparison	Race	Age	Reason for Denial	Date
1	Black	39	Work Record	1/16/87
2	Black	25	Terminated	1/23/87
3	Black	36	Work Record	1/28/87
4	Black	50	Past History	2/13/87
5	Black	60	Work Related	2/25/87
6	Black	29	Termination	2/26/87
7	Asian	(?)	Work Record	3/10/87
Plaintiff	Black	59	Work Record	3/12/87
9	Hispanic	61	Termination	3/18/87

10	Black	29	Attendance	3/20/87
11	White	37	Termination	3/20/87
12	White	36	Attendance	3/27/87
13	White	31	Work Record	3/23/87
14	Indian	49	Work Record	4/02/87
15	White	36	Disciplinary Record	4/17/87
16	White	37	Termination	6/30/87

Discussion

Timms claims the Postal Service discriminated against her when it refused to reinstate her. The discrimination is, in this Court, apparently alleged to be based upon race, sex, age and handicap. The handicap claim fails. At the time Timms sought reinstatement, she claimed the absence of a disability. Today she claims no disability. Her health problems are alleged to be temporary and not within the meaning of the Rehabilitation Act. Grimard v. Carlton, 567 F.2d 1171, 1174 (1st Cir. 1978).

The sex discrimination claim was not raised in the prior administrative proceeding and is barred. Brown v. G.S.A., 425 U.S. 820 (1976).

The race and age claims do not survive the motion for summary judgment. Person, who refused to reinstate her, denies, under oath, that he discriminated and, more importantly, he never reinstated any other postal employee prior to denying Timms' request. In the six month period (Jan.-June 1987) when Timms' request was denied, so were all others--sixteen in all, of various ages, including several whites, blacks, an asian, hispanic and indian. Person may (or may not) have been too strict in denying reinstatements--nothing goes to show that he denied them for invidious reasons.

Turning from Persons as an individual[1] to the Postal Service as a whole, Timms cites one case of a white individual who was reinstated. The cases are not comparable. Krackenberger, the white, was treated exactly as was Timms. Both left the Postal Service for reasons of health and both requested and were granted reinstatement, albeit by different supervisors. After reinstatement Krackenberger kept working. After reinstatement Timms stopped reporting for work, went on leave without pay and was terminated when she failed to respond to a request to provide a medical certificate concerning her ability to return to work. About three years later she requested a second reinstatement. This was denied. The two cases are not comparable. Timms' case is different in that it was a second reinstatement by a different supervisor following termination. There is no competent evidence to show that Krackenberger's case or any other employee's was the same as Timms'.

The record also shows that two employees who were reinstated during a relevant period were over the age of forty.

In any event, a legitimate, non-discriminatory reason for refusal to reinstate has been shown--Timms had been terminated from her previous postal job for unsatisfactory service and excessive absence. There is nothing to refute this stated reason. Indeed all that Timms does is to say that Krackenberger and other unnamed reinstated postal workers also had poor work records. No affidavit or official document supports this claim.

[1] The claim against Person is dismissed. Ellis v. U.S. Postal Service, 784 F.2d 835 (7th Cir. 1986).

Summary judgment is to be granted to the defendant Anthony M. Frank.[2]

Enter:

James B. Zagel
United States District Judge

Date JAN 16 1991

[2] The motion for appointment of counsel is denied. Timms made inadequate efforts to secure counsel on her own behalf, and a review of the papers she filed suggest that now useful purpose will be served by requiring a lawyer to contribute, probably without compensation, a lawyer's time and effort to this case.